STATE OF MICHIGAN

COURT OF APPEALS

RUTH PATTERSON,

Plaintiff-Appellant,

v

KNOLLWOOD VILLAGE ASSOCIATES LIMITED PARTNERSHIP, d/b/a KNOLLWOOD VILLAGE APARTMENTS,

Defendant-Appellee.

UNPUBLISHED
July 1, 2014

No. 314806
Genesee Circuit Court
LC No. 11-097345-NO

Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

In this premises-liability action, plaintiff appeals by right the trial court's order granting defendant's motion for summary disposition. We affirm.

This case arises out of injuries sustained by plaintiff, visiting her daughter at an apartment building owned by defendant. On appeal, plaintiff argues that the trial court erred by granting defendant's motion for summary disposition and dismissing her negligence claim, and in doing so, erred in its application of the "open and obvious danger" doctrine. We disagree.

"This Court reviews de novo a trial court's ruling on a motion for summary disposition." *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "This Court reviews the motion by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Auto Club Group Ins Ass'n v Andrzejewski*, 292 Mich App 565, 569; 808 NW2d 537 (2011). Summary disposition "is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 441; 814 NW2d 670 (2012).

Defendant filed a motion for summary disposition under MCR 2.116(C)(10), contending that plaintiff's negligence claim should be dismissed because the snow and ice on which plaintiff

slipped was an open and obvious condition, there were no "special aspects" which rendered the open and obvious condition unreasonably dangerous, the snow-covered curb and black ice complained of were not "effectively unavoidable," and that it had no notice of the alleged "defect." Plaintiff countered by asserting that the condition which led to her injuries was not open and obvious, but did not respond to the balance of defendant's arguments. The trial court ruled that the condition was "clearly open and obvious," and granted defendant's motion.

The duty that an owner or occupier of land owes to a visitor depends on the status of the visitor at the time of the injury. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000); *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013); *Bialick v Megan Mary, Inc*, 286 Mich App 359, 362; 780 NW2d 599 (2009). A visitor can be a trespasser, a licensee, or an invitee. *Stitt*, 462 Mich at 596; *Sanders*, 303 Mich App at 4. Here, it is undisputed by the parties that plaintiff was an invitee when she was at defendant's premises on the night of her injuries.

Generally, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). However, this duty does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious that an invitee can be expected to discover them himself. *Ghaffari v Turner Constr Co*, 473 Mich 16, 21; 699 NW2d 687 (2005). An invitor is not required to protect against or warn of open and obvious dangers unless he should anticipate the harm despite the invitee's knowledge of it. *Hoffner*, 492 Mich at 460-461; *Ghaffari*, 473 Mich at 21-22; *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693; 822 NW2d 254 (2012). Whether a danger is open and obvious depends upon whether an average user with ordinary intelligence would have been able to discover the danger upon casual inspection. *Hoffner*, 492 Mich at 461.

A premises owner has a duty to use reasonable care to diminish the hazards of ice and snow accumulation. *Id.* at 464. However, wintry conditions can be open and obvious such that a reasonably prudent person would foresee the danger and the premises owner's duties are thus narrowed. *Id.* If the condition is open and obvious, liability arises only if there were special aspects to the condition. *Id.* This is an objective standard, and the relevant inquiry is "whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008).

In determining whether a danger presents an unreasonable risk of harm despite being open and obvious, a court must consider whether special aspects exist, such as a condition that is unavoidable or that poses an unreasonably high risk of severe injury. *Hoffner*, 492 Mich at 461. The determination must be based on the nature of the condition at issue, and not on the degree of care used by the invitee. *Lugo v Ameritech Corp*, 464 Mich 512, 523-524; 629 NW2d 384 (2001); *Jimkoski v Shupe*, 282 Mich App 1, 7; 763 NW2d 1 (2008). A hazard is effectively unavoidable if a person, for all practical purposes, is required to confront the hazard. *Hoffner*, 492 Mich at 469.

The analysis of the instant case must begin with plaintiff's admitted familiarity with the weather conditions in Michigan during the winter months. Plaintiff concedes that, having grown

up in Michigan, she knows that snow and ice is slippery. As a resident of Michigan, plaintiff should have anticipated that ice frequently forms beneath snow during snowy January nights. *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 119; 689 NW2d 737 (2004), rev'd on other grounds 472 Mich 929 (2005). Plaintiff testified that, while there were no overhead lights in the parking lot outside the apartment building, the light of the full moon was adequate to illuminate the snow so she could see it. She described the parking lot as uneven, with mounds of snow of varying depths where cars had been parked. In describing the incident, plaintiff said, "there was ice underneath the snow when my foot went down," and "[t]he snow covered the curb. And . . . I thought I was stepping on solid ground, I actually stepped on the slant of the curb and my foot slid down."

"Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Buhalis*, 296 Mich App at 694 (quotation marks and citation omitted). "[B]y its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis v Hartfield Lanes*, 271 Mich App 61, 67; 718 NW2d 382 (2006).

In the present case, plaintiff observed the weather conditions on the night of the incident leading to her injuries. Although she knew of the potential hazards presented by a visibly snowy and perhaps icy parking lot and surrounding area, she chose to ignore them when she put her foot onto what she thought was the snow-covered curb, intending to "step outside where the path was shoveled as far as I could reach." As she did so, plaintiff instead stepped on the "slant of th[e] curb." A reasonable person in plaintiff's position would have foreseen the danger and made a different decision. No genuine issue of material fact exists regarding whether the "mounds of snow," and the ice underneath, involved an open and obvious risk of harm.

In addition to her general awareness of the winter weather, plaintiff was familiar with the apartment building and environs, having been to it "once or twice a month" during the previous year to visit. Although plaintiff and her husband usually parked on a particular side of the building, on the evening of her injury, they chose to park on the other, unfamiliar, side of the building because they wanted to save their daughter the trouble of coming down the stairs to let them inside. While plaintiff's motive in parking where she did might have been altruistic, it cannot be said that she was without alternatives, such that the snow and ice that caused her fall was unavoidable. A hazard is effectively unavoidable if a person, for all practical purposes, is required to confront the hazard. *Hoffner*, 492 Mich at 469. Here, when confronted with the snowy parking lot, plaintiff could have asked her husband to park in another location. She could have asked to be dropped off at a different spot or any number of alternatives to avoid the open and obvious conditions she observed. Plaintiff has not established a genuine issue of material fact concerning whether the snowy condition of the walkway was effectively unavoidable.

Plaintiff attempts to "refine" her argument on appeal, contending that the hazard that caused her fall was a parking lot curb, "hidden" within a snow bank, and not, as pleaded in her complaint and argued in the trial court, "black ice" and "mounds" or accumulation of snow and ice. The analysis is unchanged, as plaintiff knew of the existence of the curb and, more importantly, testified that she believed there was ice on it also: "it was very slippery." A condition is open and obvious if "it is reasonable to expect that an average person with ordinary intelligence would have discovered the condition upon a casual inspection." *Hoffner*, 492 Mich

at 461. A reasonable person, having casually inspected the area, would have perceived the mounds of snow and would have anticipated the underlying ice before disregarding the danger and stepping into it.

In sum, it was beyond genuine factual dispute that the snow and ice was an open and obvious condition and did not have any "special aspects" that precluded application of the open and obvious danger doctrine. The trial court properly granted summary disposition in favor of defendant.

Given our resolution of the issue, we need not address defendant's alternative argument that it lacked actual or constructive notice of the allegedly dangerous condition.

Affirmed. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray
/s/ Kathleen Jansen